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# ESSAY

## POLICIES OF OPPORTUNITY: FAIRNESS AND AFFIRMATIVE ACTION IN THE TWENTY-FIRST CENTURY\*

*Robert M. Berdahl*<sup>†</sup>

By holding this forum for diverse viewpoints on affirmative action and race issues affecting university campuses, Case Western Reserve University is making an important contribution to the civil discourse that is vital to all campuses and to the country. One of the people centrally responsible for stimulating the debate over affirmative action in university admissions, Ward Connerly, will conclude this forum. As a Regent of the University of California, Mr. Connerly sponsored the movement to end the consideration of race in university admissions, and he subsequently led a campaign resulting in the passage of Proposition 209, which ended affirmative action in California education, employment, and contracting in general. He has carried that campaign to other states, most notably Washington and Florida.

For these efforts, Mr. Connerly has been vilified by many throughout the country, especially those on college campuses. It may surprise many of you to learn that, although I disagree with Mr. Connerly, I have great respect for him, and this is not merely because he happens to be a Regent of the University of California. (Although that might be reason enough, since as Regent, he is one of my bosses.) It is because he has built his case on firmly held principles—principles that are not easily refuted. He has argued his case cogently, treating his critics with much more courtesy than they have frequently accorded him. He is an implacable foe of discrimination in all of its manifestations, a principle that caused him to lead the California Regents to extend employment-related benefits to the same-sex

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partners of employees. This action confounded many political conservatives in California who failed to understand that Mr. Connerly is guided by the principle of anti-discrimination rather than political expediency.

I mention Mr. Connerly here at some length not only because he will be appearing in this forum later, but also because those who continue to support affirmative action will have to take his arguments seriously. We, too, will have to ground our case in a philosophical argument consistent with American traditions and constitutional principles. This issue will be addressed later; these remarks will be, in some sense, a public discussion with Mr. Connerly, since we will share this same podium, although not at the same time. But first, some observations about history are in order, for history helps to clarify where we are currently on any given issue.

### I. CONCISE HISTORY OF RACE IN AMERICA

Throughout American history, from the early colonial period to the present, race has played a central role in our legal system, in our political conflicts, and in our social relations. Race was incorporated into the Constitution, which originally counted African-American slaves as three-fifths persons. The most costly war in American history was fought over the enslavement of persons of African descent. Race has continued to be a central feature of our political discourse, through Jim Crow and the civil rights movement, up to the current debate over affirmative action. Race is similarly at the center of any discussion regarding the nature of our social relations. We know that African-American and Hispanic children in our society have a much greater chance of growing up in poverty and attending schools that are generally inferior to those of white children. They have less access to good medical care, much higher rates of unemployment, and a far greater chance of ending up within the criminal justice system. It was in response to these systemic manifestations of racism that policies of equal opportunity and affirmative action were crafted in the 1960s and 1970s.

Against this legal, political, and social backdrop, affirmative action supporters at the University of Texas at Austin were astonished to read *Hopwood v. Texas*.<sup>1</sup> In *Hopwood*, Judge Smith, writing for the majority, asserted that "[t]he use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."<sup>2</sup> Such a statement reflected either a remarkable ignorance of, or a remarkable

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<sup>1</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>2</sup> *Id.* at 945.

indifference to, the entire history of race and racism in the United States. It is this refusal to confront history and what it means that often makes it difficult to discuss the subject today.

The introduction of affirmative action into American policy and practice took place at a particular historical moment. It came in the wake of the civil rights movement of the 1960s, when Americans recognized that legalized segregation was morally wrong, constitutionally indefensible, and socially destructive. Linked to the provision of equal opportunity, affirmative action was meant to counterbalance the many years in which equal opportunity had been denied to African-Americans by many forms of institutionalized racism.

Moreover, the 1960s were also characterized by a political culture of activism that went well beyond the civil rights movement. It was the era of the Great Society and the War on Poverty. The country was committed to completing the work of the New Deal and the Fair Deal and to creating a society of great and equal opportunity. It was a period of public investment in public goods. Public higher education, for example, was expanded enormously at public expense because it was seen as a public good.

Then the reaction began. As with many other political and social movements, it began in California and then spread to the rest of the country. It began with the election of Ronald Reagan as governor in 1966 and continued with a tax revolt that won the passage of Proposition 13 a decade later. Reagan had a conservative political agenda; Proposition 13, the property-tax limitation, had a conservative fiscal agenda. Reagan attacked the University of California, Berkeley, above all, as a center of liberal political activism. One of his first actions as governor was to demand the dismissal of Clark Kerr as president of the University of California. His curtailment of public investment in public goods other than defense continued through his presidency. Beginning in 1978, Proposition 13 devastated public investment in California. At that time, California was among the top ten states in per pupil expenditure for elementary and secondary education. Today, it has fallen to the bottom five.

Beginning in the 1980s and continuing through the 1990s, there has been a tremendous shift in the public mood in America. It has been characterized by the belief that public investments are wasteful and, in fact, counterproductive, the substantial privatization of public goods, and the increase of fees for access to everything from state and national parks to public universities. The private sector is seen as more efficient and productive than the public sector, and so we have turned to the private sector to run more public facilities. This is not to suggest that public investment in public goods has ceased, but there has been a profound change in the public attitude.

In this context, policies perceived as inhibiting private individual initiative are disfavored. Taxes, of course, are seen as the main culprit in dampening individual incentive, so politicians run for office with no greater vision of the public interest than the goal of reducing taxes. Similarly, any policy that seems to undermine meritocracy also comes under fire. Individual achievement and individual initiative are to be encouraged; the greatest public good, it is believed, will accrue from the collective achievements of the individuals who comprise a meritocratic society. In the university setting, as a result, individual merit should be the sole criterion upon which university admissions are based. Affirmative action, as a product of a "failed" program of the Great Society, is a major barrier to the achievement of meritocratic principles because it provides access to major public goods, namely universities, for individuals based on factors other than merit. Moreover, to affirmative action critics like Stephan and Abigail Thernstrom, affirmative action is just as bad for those whom it is intended to serve as it is for those not served, because minority students are better served by going to less challenging universities where they merit admission than by going to more selective institutions under the umbrella of affirmative action.<sup>3</sup>

There is one additional factor that needs to be taken into account as we review the history leading up to the current attack on affirmative action. Affirmative action was acceptable to the public so long as the public good being distributed was readily available. But as the demand for public higher education increased and the supply became scarce, affirmative action became less tolerable to the general public. The value of a Berkeley or UCLA degree, real or imagined, for example, drove the demand for access to these two campuses, each of which had already reached its capacity. In 1975, 77% of applicants to Berkeley as freshmen were accepted. By 1990, only 38% of applicants could be accepted at Berkeley, and, by 1999, the admissions rate had fallen to 27%.<sup>4</sup> With the projected increase in demand coming in the next decade, Berkeley's admission rate is projected to fall to 17% by 2010.<sup>5</sup> Thus, as an increasing number of students were denied admission to UCLA and Berkeley, public frustration focused on the fact that some admission slots were being filled by students of color admitted over more qualified applicants. In Ward Connerly's new book, he declares that it was this realization, brought to his attention by a highly qualified applicant who had been denied admis-

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<sup>3</sup> See generally STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997).

<sup>4</sup> See John Aubrey Douglass, *The Evolution of a Social Contract: The University of California Before and in the Aftermath of Affirmative Action*, 34 EUR. J. EDUC. 393, 397-98 (1999) (discussing the history of University of California admissions).

<sup>5</sup> See *id.*

sion to the University of California medical schools, that precipitated his attack on affirmative action.<sup>6</sup>

Thus, the effort to end affirmative action, like its beginning, has taken place at a particular juncture of historical forces in American society.

This brief history offers an explanation of the origins of the current attack on affirmative action in university admissions. In this telling of the story, consideration of anything other than merit in university admissions is relatively new, beginning with the affirmative action policies of the 1970s. But this version does not provide the broader historical context in which race emerged as a factor in the admission of students to universities like the University of California, for university admissions have always been the product of a mixture of public interest, institutional interest, and individual merit.

Admissions policies at public universities historically have tried to find a balance between the often conflicting needs of society, the merit of individual applicants, and the interests of the university. Access to public higher education has always involved a component of social engineering, for higher education has provided a means of social mobility for individuals and a trained and professional work force for the American economy. Additionally, universities have always tried to fulfill an implicit or explicit social contract. The founding charter of the University of California, for example, enunciates three general principles related to admissions: one, students should be admitted from throughout the state; two, to ensure access to all social classes, the university should be tuition free (because of this stricture, we still do not charge what we call tuition for attending the university; we charge fees instead); three, admission should be free of political and sectarian influences. Two years later, the admission of women was added to the admission policies. By 1880, the university had also become selective in its admissions, defining its own admissions requirements.

But already during the 1880s, it was recognized that the quality of high schools varied tremendously, so a category of "special admissions" was created to ensure access to students from disadvantaged backgrounds. By the 1930s, this category had grown in importance as a means of admitting students, and with the passage of the GI Bill after World War II, it became an even more important means of meeting the university's social obligation. Between 35% and 45% of admissions to UCLA and Berkeley were done through the special admission category in these years, a far greater percentage than was ever admitted because of affirmative action. Special admissions were

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<sup>6</sup> See WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES* 124 (2000).

later restricted at the university, to 4% in 1968 and later to 6% in 1979, but it still remains a category of admission.<sup>7</sup>

In this reading of history, the use of race, ethnicity, and gender in university admissions is entirely consistent with the university's effort to meet its social contract, a component as logical as geographic representation, consideration of economic disadvantage, or veteran status, and certainly as logical as the special admissions category, which has waxed and waned over the years. How the university should balance its social obligations with the considerations of individual merit is not a new debate; it has gone on for decades within the University of California system.

In addition to fulfilling a social contract, university admissions have also functioned to enhance the education of all of the students enrolled by securing a diverse student body. This, too, was part of the function of the geographic and socioeconomic distribution of admissions, assuring that students would come into contact with students from different backgrounds and social experiences. Some have alleged that the argument that diversity enhances the education of everyone in the university is merely an excuse, an argument generated only after affirmative action came under fire. This is simply not the case. At Berkeley, for example, a conscious effort to build a more international student body was undertaken in the 1930s, with the clear recognition that it was in the educational interest of Californians enrolled there. A storm of xenophobic protest occurred in Berkeley in the early 1930s when the construction of International House, a large international residence hall on the campus, drew attention to the internationalization of the campus.

This is undoubtedly enough history. This overly long discussion of history, however, is the essential frame for any discussion of affirmative action. Much of the attack on affirmative action ignores history, suggesting that race is no different than blood type, that consideration of societal needs in university admissions is a new or invalid factor, or that there is no moral distinction between the use of racial preferences in university admissions to overcome the effects of past legal and current societal discrimination, on the one hand, and the use of racial preferences to achieve segregation, on the other hand. History reminds us, however, that universities have long used their admissions processes to achieve various social and institutional objectives.

## II. THE AFFIRMATIVE ACTION DEBATE

Let us now turn to the issues under discussion in the current debate. First, it must be observed that the current debate has become so

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<sup>7</sup> See Douglass, *supra* note 4, at 397-98.

politicized and polemical that rational and civil discourse has become extremely difficult. Both sides are responsible for this state of affairs. Opponents of affirmative action have misrepresented facts, such as claiming that universities have established "racial quotas,"<sup>8</sup> and have consistently distorted statistics. Proponents of affirmative action, for their part, have vilified their opponents, often accusing them of racism. They have consistently failed to acknowledge some of the disadvantages associated with affirmative action or the legitimate philosophical objections raised against it. Perhaps this forum can help to change that.

#### *A. The Affirmative Action Opposition*

Those who support affirmative action must take seriously the arguments of opponents, like Ward Connerly, who have voiced strong philosophical and principled objections to it. Mr. Connerly believes intently that the goal of American society should be complete racial integration to the point at which race will no longer be a category of distinction. His own ancestry is a mixture of French Canadian, Choctaw, Irish, and African-American, and he is married to a white woman. Consequently, he believes that race should not be a defining category and that complete integration requires a color-blind society. He believes it is increasingly impossible to categorize people by race. He recognizes the presence of racial discrimination in our society, but he believes that it cannot be overcome by granting compensatory preferences because such preferences merely reinforce the racial distinctions that lead to discrimination. He believes that the use of affirmative action in university admissions has led minority students to underachieve in high school. He disagrees profoundly with Justice Harry Blackmun, who wrote in defense of affirmative action: "In order to get beyond racism, we must first take account of race."<sup>9</sup> For Mr. Connerly, we can never get beyond racism by taking account of race; we can never build a society of equality before the law if we legalize some inequalities. While he recognizes the importance of diversity in the university setting and has supported efforts to achieve it, he believes that those who insist on the educational importance of diversity have overstated their case.

These are substantial arguments; they are not the arguments of a polemicist or a political opportunist, and they cannot be dismissed as the arguments of someone oblivious to racial discrimination in the

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<sup>8</sup> Whenever he is asked about his view of affirmative action, Governor George W. Bush of Texas responds, "I am against quotas," thus not answering the question, but suggesting that affirmative action and quotas are synonymous.

<sup>9</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).



United States. Any effective and cogent defense of affirmative action must come to grips with them.

*B. How to Respond to Opponents of Affirmative Action*

It is important to note that there is virtually no distinction to be drawn between the substantive goals enunciated by Mr. Connerly and those who support affirmative action: both look forward to a fully integrated society in which racial discrimination will have ceased to exist and in which racial differentiation will have no impact on individual opportunities. The overriding moral objective is the creation of a racially just society. The question dividing proponents and opponents of affirmative action is how best to achieve this moral objective. To understand this disagreement, one must understand that the opposing sides differ greatly in their understandings of the social costs attendant upon achieving the racially just society.

It is useful in this context to call attention to the distinction drawn by Glenn Loury between "color-blind" admission policies and "color-neutral" admission policies.<sup>10</sup> A color-blind admission policy, such as that advocated by Mr. Connerly, insists that the admission of individuals to a university be done without reference to race or, preferably, without even knowledge of the race of the individual under consideration. Recognizing, however, that such a color-blind policy may exact too high a social cost—in the form of less diversity on highly selective campuses—other opponents of affirmative action have been somewhat willing to accept an admissions policy that is color-blind in its procedure, but not necessarily color-neutral in outcome. Such a policy aims at attaining the goal of racial justice and diversity through the admission of groups of applicants without reference to the racial identity of individuals who comprise the groups. It acknowledges the importance of diversity as a social good while seeking a proxy for race, thus achieving the same or similar outcome without using race as a factor.<sup>11</sup>

Although it is clear, for example, that a majority of the population of Texas was opposed to affirmative action as a means of achieving racial diversity in its selective institutions, a significant number of Texans were uneasy about the social costs of ending affirmative action. The social costs of ending affirmative action were viewed as not only the denial of access to minorities to the best public institutions in the state, the University of Texas at Austin and Texas A&M University, but also the recruitment of a large number of the

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<sup>10</sup> See Glenn Loury, *Foreword* to WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* at xxi, xxiii (2d ed. 2000).

<sup>11</sup> See *id.* at xxiii-xxv.

best minority students by out-of-state institutions, perhaps depriving the state of future minority leaders. The Texas legislature thus adopted the policy of guaranteeing admission to any state university to the top 10% of students in each high school in the state. This was a color-blind policy that was decidedly not color-neutral, for its purpose was to sustain racial diversity in the admissions process.

This policy has apparently sustained roughly the same undergraduate minority enrollments at University of Texas at Austin as before the end of affirmative action, and it may even have increased the number of minorities enrolled.<sup>12</sup> But this policy is not without some serious social costs, costs that may be higher than the costs of affirmative action. By assuring access to the top 10% of students from all high schools, weak or strong, this policy may inadvertently block access to those students who attended very strong high schools and thus did not graduate in the top 10%, but who would do better at the university than students who graduated in the top 10% of weaker high schools. In short, although the end of affirmative action was intended to reward individual merit in college admissions, the effort to attain the overriding moral objective of racial justice through other means may have actually weakened the merit-based system of admissions.<sup>13</sup> The social costs may be even higher in Florida, where race-sensitive admissions have been discontinued with a guarantee of admission into all public universities for the top 20% of each high school class. Considerations of individual merit have thus been substantially set aside in Florida.

The second social cost of this policy is that its very success in continuing to produce a diverse student body depends on the continuing the de facto segregation of Texas high schools. This certainly does not advance the cause of a fully integrated and racially just society.

The third consequence of a color-blind solution to undergraduate admissions is that it does nothing to address the social cost of the end of affirmative action for graduate and professional school admissions. No color-blind proxies are available here. The decline of access for minority students to outstanding legal and medical education may, over the long run, be one of the greatest social costs of ending affirmative action.

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<sup>12</sup> See Bruce Walker, *Implementation and Results of HB 588 at the University of Texas at Austin*, tbl II (last modified Apr. 2000) <<http://www.utexas.edu/student/research/reports/admissions/HB5882000329>> (showing enrollment by ethnicity for the university's entering freshman class during the academic years 1996-99).

<sup>13</sup> It is important to note that when the Regents of the University of California voted for a similar 4% admissions policy, which Mr. Connerly supported, they did so only because it would not have a displacement effect, such as may be the case in Texas.

Thus, the social costs of alternative means of sustaining diversity need to be carefully measured and weighed against those of affirmative action.

Many have suggested that economic disadvantage can serve as a proxy for race, thereby introducing a category for admissions that remains color-blind in its procedure, but which is not color-neutral in outcomes.<sup>14</sup> The University of California Regents allow for consideration of economic disadvantage in admissions, but since 1995 it has had little effect on the diversity of enrollment at Berkeley simply because of the very large number of poor white and Asian students who apply.<sup>15</sup>

If the social costs of the efforts to sustain diversity in a color-blind environment are relatively high, as they are in Texas and Florida, what about the costs of ending affirmative action at the University of California? Here, those who support affirmative action may be guilty of overstating the costs, at least until the present moment. Media attention has focused on the dramatic drop in minority enrollment at Berkeley's Boalt Hall Law School and in undergraduate admissions at Berkeley and UCLA. The drop at Berkeley has been substantial. The enrollment of African-American freshmen has fallen by 49% between 1997 and 1999 and that of Chicano/Latino freshmen has fallen by over 30% during the same period.<sup>16</sup> The decline at UCLA is not quite as steep, but it is also substantial.<sup>17</sup>

Obviously, this decline should arouse concern regarding the effect on the educational experience of all Berkeley students. Of greatest concern is the decline of minority enrollment in graduate and professional programs.

But those numbers, broadcast by the national media, do not tell the whole story. The students denied admission to Berkeley and UCLA were gaining admission to other University of California campuses, each of which is strong, with six of the eight general undergraduate/graduate campuses being members of the Association of American Universities. Some campuses have lost minority enrollment while others, especially Santa Cruz, Irvine, and Riverside, have gained. Overall, system-wide minority enrollment has declined only

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<sup>14</sup> See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 46-47 (2d ed. 2000) (discussing class-based affirmative action).

<sup>15</sup> See *Ethnicity for Undergraduates* (visited Sept. 20, 2000) <<http://osr.berkeley.edu/public/staffweb/tc/trends/ethf99tblbver1.html>> (showing percent of Berkeley undergraduates by ethnicity for the academic years 1986-99).

<sup>16</sup> See University of California Application, Admissions, and Enrollment of California Resident Freshman for Fall 1999, 1998, and 1997 (visited Sept. 20, 2000) <[http://www.ucop.edu/ucophome/commserv/flowfrc9799\\_3yrs.pdf](http://www.ucop.edu/ucophome/commserv/flowfrc9799_3yrs.pdf)> (showing statistics on enrollment and admissions by ethnicity for all campuses in the University of California system).

<sup>17</sup> See *id.*

2.4%.<sup>18</sup> Viewed from a system-wide perspective, it is difficult to claim that the damage caused by the end of affirmative action has been severe, judged in terms of overall minority access to high-quality education. It is hard to say what the cost of affirmative action will be over the next decade, but it may be higher considering demographic growth and the expected decline of admission rates throughout the University of California system.

We must also admit that the end of affirmative action in California has also prompted some important positive steps. It has illuminated the woeful inadequacies of many of the public schools in California, especially many inner-city schools. Lawsuits have been filed to correct the paucity of advanced-placement college preparatory classes in some high schools. To date, however, there are no lawsuits against public school systems based on Proposition 209, which prohibits all considerations of race in California public education. There is ample evidence to demonstrate that race is a factor in the discriminatory practices of many schools where, for example, the "tracking" of students clearly has a racial component.<sup>19</sup>

In addition, the University of California is currently engaged in multiple efforts to improve the quality of its high schools as well as outreach efforts to directly improve the educational opportunities available to students in disadvantaged schools. These outreach efforts are color-blind, not color-neutral, for they are concentrated in the inner cities with large minority populations. Taking these efforts into account, the University of California will spend nearly \$250 million next year on various forms of outreach.<sup>20</sup> Whether this investment will bring the percentage of minority and disadvantaged high school graduates eligible for admission to University of California into line with the percentage of minority and disadvantaged population in the state seems doubtful. It is a commendable effort, however, unparalleled in the country, and it was directly caused by the end of affirmative action.

Finally, Berkeley has undertaken a complete revision of its undergraduate admissions process in an effort to develop a more balanced definition of merit. Like most large public universities, Berkeley had become too reliant on an "academic index"—a sliding scale of SAT scores and GPAs—that was entirely too mechanical in its assessment of applicants. Such a mechanistic process, employed by most large universities, has invited the comparisons that have led to the challenges to the use of affirmative action in admissions. Ber-

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<sup>18</sup> See *id.*

<sup>19</sup> See generally LINDA DARLING HAMMOND, *THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK* (1997).

<sup>20</sup> See *Experts Discuss Causes of Low UC Eligibility at Regents Meeting*, ¶ 2 (visited Sept. 20, 2000) <[http://www.ucop.edu/outreach/outlook/OLA\\_research.html](http://www.ucop.edu/outreach/outlook/OLA_research.html)>.

keley has since moved to a process in which each individual application, complete with its essay, is read by two readers and graded by each on an academic scale and a comprehensive scale. If the readers' scores of an application differ by more than one point out of a possible seven, a third reader reads the application. The achievements of each applicant are judged within the context of his or her opportunities. This has required a substantial investment in the admissions process, for there are 34,000 applications to read each year. This new system is color-blind and color-neutral, but has provided more confident assessments of genuine merit. This would probably not have happened without the impetus of the Regents' action to end affirmative action.

Accordingly, it can be argued that the overall damage caused by the end of affirmative action in undergraduate admissions to the University of California has not been catastrophic, despite the heavy cost at Berkeley and UCLA and the severe damage it has done to graduate and professional school admissions. But what would be the effect if the national campaign to end affirmative action were successful? What if the Supreme Court were to strike down race-sensitive admissions nationally as the Fifth Circuit has done in Texas? Such action would, of course, also affect all private universities and colleges that receive federal funds. What would be the social costs of such a change? Would we be closer to racial justice in America, or further from it? I believe the costs would be enormous and that we would be much further from the shared goal of racial justice.

In support of this position, the landmark study of William Bowen and Derek Bok offers the only substantial statistical study of the long-term consequences of considering race in college and university admissions. Based on a database compiled from the matriculation records of twenty-eight selective universities, mostly private, but including three large public universities, between 1976 and 1989, the study tracks the performance of African-American and white matriculants, in college and beyond. Each of the universities employed race-sensitive admissions processes. The study shows that although African-American students entering these selective universities had substantially lower SAT scores and high school grades than their white and Asian classmates, they were, by any standard, strong students. Although African-American students graduated from these selective institutions at slightly lower rates than their classmates, at a graduation rate of 75%, they graduated at far higher rates than African-American or white students at non-selective institutions.<sup>21</sup> African-American graduates of the colleges surveyed were more than five times as likely as all African-American graduates to earn professional

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<sup>21</sup> See BOWEN & BOK, *supra* note 14, at 55-57.

degrees or Ph.D.'s, and they were as likely as their white classmates to receive advanced degrees in law, medicine, or business.<sup>22</sup> Twenty years after entering college, African-American men graduating from these selective colleges earned twice the national average of African-American men with bachelor degrees, and African-American women earned 80% more than all African-American women with bachelor degrees.<sup>23</sup> This demonstrates the role that the admission of black applicants to these selective institutions played in helping to create a much larger black middle class in America than existed prior to the beginning of affirmative action. In addition, African-American matriculants at these institutions subsequently participated in community and civic undertakings at a higher rate than their white classmates.<sup>24</sup>

Moreover, contrary to claims that affirmative action led to a rigid self-segregation on campuses, the study showed that greater racial diversity on the campuses positively affected the attitudes of white students toward African-American students. Fully 56% of white matriculants in 1989 reported that they "knew well" at least two African-American students and 26% reported knowing well at least two Hispanic students, despite the fact that each of these minority groups made up less than 10% of the total undergraduate population.<sup>25</sup> This is powerful evidence that considering race in admissions does not reinscribe discrimination; in fact, it significantly helps to overcome it.

These important findings are far more compelling than the evidence, most of it impressionistic, offered by opponents of affirmative action. Thus far, despite some carping about the nature of the institutions included in the study or the fact that it excludes Hispanic students,<sup>26</sup> no substantial criticism significantly alters the validity of the conclusions reached by Bowen and Bok. These conclusions provide evidence to support Justice Blackmun's aphorism: "To get beyond racism, we must first take account of race."

What about some of the other arguments raised by Mr. Connerly? Is race an increasingly less meaningful category in a multiracial society with increasing rates of intermarriage? Mr. Connerly clearly has a point, as his own family illustrates. Interracial marriage will likely increase. The difficulties with racial categories in California currently confronting the U.S. Census will increase with each subsequent census. It is also true that the self-declaration of race for pur-

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<sup>22</sup> See *id.* at 97-98.

<sup>23</sup> See *id.* at 122-23.

<sup>24</sup> See *id.* at 158-59.

<sup>25</sup> See *id.* at 231-33.

<sup>26</sup> See Curtis Crawford, *Weighing the Benefits and Costs of Racial Preference in College Admissions*, SOC'Y, May-June 2000, at 71; Martin Trow, *The Shape of the River: California After Racial Preferences*, 135 PUB. INTEREST 64 (1999); Sara Hebel, *An Analyst's Unusual Influence over Higher-Education Debates*, CHRON. HIGHER EDUC., Mar. 10, 2000, at A32 (reviewing THE SHAPE OF THE RIVER).

poses of university admissions or scholarships raises significant problems.

But that is not to say that racial differences do not remain significant barriers to the achievement of equal opportunity and a racially just society. How does one explain the fact, for example, that of all of the students in a southern California school district who qualify to take the college preparatory mathematics sequence, 100% of the Asian students and 88% of the white students are tracked into it, while only 51% of the African-American and 44% of the Hispanic students are tracked in?<sup>27</sup> Race still matters in schools, the criminal justice system, and the economic structure of the country. Declaring race to be a non-relevant category does not make it so and it will not, in itself, produce a racially just society. If critics of affirmative action believe that thirty years is long enough for affirmative action to have leveled the playing field, then waiting for the melting pot to end racial distinctions will be glacial by comparison.

Does affirmative action lead minority students to underachieve because they believe they can gain admission to selective universities without being completely competitive? This is plausible. But minority underachievement is attributable to many factors, leading one to conclude that any role affirmative action may play is minuscule. Underachievement has much more to do with poor schools with few qualified teachers. It is also the result of a culture of rejection, in which "achieving" is seen as "acting white." Underachieving on standardized tests, the primary measures of achievement, is also related to racial stereotyping about test performance, as Claude Steele has persuasively shown.<sup>28</sup>

Finally, a serious question that all of us should consider: Can we build a society based upon the ideal of equality before the law if we legalize some inequalities, as in race-sensitive admissions? This is a difficult question to answer, either way. Clearly we tolerate many social and economic inequalities that translate directly into legal inequalities. More to the point, however, is the fact that there is a fundamental moral difference between legalized inequalities that are intended to deprive a minority population of equal treatment, as with segregation, and legalized inequalities that are intended to correct the effects of systemic discrimination suffered by a minority population. Segregation and affirmative action are not moral equivalents. Nor are they legal equivalents, no matter how much the use of the phrase "reverse discrimination" tries to make them seem the same.

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<sup>27</sup> See The Achievement Council, *How Many Students Don't Get Placed in Algebra?* 4 fig.2 (n.d.) (unpublished manuscript, on file with the *Case Western Reserve Law Review*).

<sup>28</sup> See Claude M. Steele, *Thin Ice: 'Stereotype Threat' and Black College Students*, ATLANTIC MONTHLY, Aug. 1999, at 44.

## CONCLUSION

This leads us back to the beginning—the need to understand the deep scar that race has inflicted on the history of this country. No one understands this more than those, like Ward Connerly, who have felt it from their youth. Mr. Connerly has written:

[R]ace is a scar in America. I first saw this scar at the beginning of my life in the segregated South. And now, over fifty years later as we enter a new millennium, I know it is still here—prominent, disfiguring, often inflamed—evidence of the terrible injuries of the past. Black people should not deny that this mark exists: it is part of our connection to America. But we should also resist all of those, black and white, who want to rip open that scar and make race a raw and angry wound that continues to define and divide us.

Left to their own devices, Americans will merge and melt into each other.<sup>29</sup>

These sentences capture the essence of the current debate.

The goal, upon which all agree, is a fully integrated society, one in which race ceases to be of consequence, a society of complete and equal justice. No one, except the vilest racist, wants to “rip open the scar and make race a raw and angry wound,” although I confess to having seen more raw anger since the effort to end affirmative action began than I saw before. This anger and alienation has to be counted as one of the social costs of the current effort to end affirmative action. But the debate is about means, not ends; it is about whether social justice can be achieved in the absence of social policies aimed at enhancing the opportunities of those who have historically had opportunity denied to them; it is about whether or not, “left to their own devices, Americans will merge and melt into each other,” as Mr. Connerly confidently asserts.

In reading American history, it is doubtful whether, in the absence of intervention, if left merely “to their own devices,” Americans would have ended segregation when we did. I think the weight of evidence is far greater on the side of some formal intervention to end discrimination than it is on the side of discrimination ending naturally, by leaving Americans “to their own devices.” The social costs of that intervention, in the form of affirmative action, have been minimal compared with the gains that have been made. And the history of university admissions shows that we have succeeded in addressing the needs of social justice, whether it be for disadvantaged

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<sup>29</sup> CONNERLY, *supra* note 6, at 19.



youths or GIs returning from war, when we have consciously crafted admissions policies to achieve a social good.